IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No.11871 of 2006
with
SPECIAL CIVIL APPLICATION Nos.18409 to 18482 of 2006
with
SPECIAL CIVIL APPLICATION No.19754 of 2006
with
SPECIAL CIVIL APPLICATION No.19769 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE JAYANT PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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AMIT V BANSAL & 74 - Petitioner(s)
Versus
STATE OF GUJARAT & 3 - Respondent(s)

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Appearance :

MRS KETTY A MEHTA for Petitioner(s) : 1 – 75.

MR SUNIT S SHAH, GOVERNMENT PLEADER for Respondent(s) : 1,
IN SCA No.11871, 18409 TO 18446 AND 19754 AND 19769 of 2006 AND

MR MENGDEY, AGP IN SCA No.18447 to 18482 of 2006 for Res. No.1

NOTICE SERVED BY DS for Respondent(s) : 1 - 4.
MR PRASHANT G DESAI for Respondent(s) : 2,
MR YH MOTIRAMANI for Respondent(s) : 4,

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CORAM : HONOURABLE MR.JUSTICE JAYANT PATEL

Date : 26/09/2006

COMMON ORAL JUDGMENT

1. In all the petitions, as facts are inter-connected and common questions arise, they are being considered by this common order.
2. Special Civil Application No.11871 of 2006 with SCA Nos.18409 of 2006 to 18482 of 2006 are preferred by 75 occupants of the industrial unit in Chammunda Industrial Estate. The prayers made in the petitions are to declare that the notice dated 3.5.2006 Annexure “C” is illegal and they have also prayed that the order passed on 19th May, 2006 by the Corporation for cancellation of the construction permission is illegal.
3. Special Civil Application Nos.19754 and 19769 of 2006 are preferred by two persons for the relief, inter alia, to quash and set aside the very order dated 19th May, 2006 for cancellation of the construction permission and it is also prayed by these petitioners that Respondent Nos.1 and 3 be directed to remove construction made over the COP and to remove the illegal and unauthorised tube-well made for extracting water

for selling the same to the nearby industrial unit at the instance of respondent No.2.

4. Heard Ms.Mehta as well as Mr.Trivedi, learned Counsel for the concerned petitioners, Mr.Sunit S. Shah, learned GP with Mr.Mengdey, learned AGP for the State, Mr.P.G.Desai, learned Counsel for the Surat Municipal Corporation, and Mr.Motiramani, learned Counsel for Sadhna Shekar Rai, for final disposal.

5. It appears that earlier Respondent No.4 herein had preferred writ petition before this Court being SCA No.5272 of 2001 and the same was considered with SCA No.4936 of 2004, which was preferred by the other persons making construction over different land, but forming part of the same final plot. The said petitions came to be decided by this Court as per the order dated 7.4.2005. In the said matters, essentially the dispute arose in respect to the portion of the land, which was originally shown as a part of marginal land in the first construction plan and subsequently shown as part of COP. Since the proper margin was also to be verified and construction over the other land was stopped, SCA No.4936 of 2004 was preferred.

This Court, after hearing both the sides, at para 11 directed as under:

> "11. *In view of the above observations and discussion, I find that the following directions deserve to be issued:*
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> *(i) The Commissioner of the Surat Municipal Corporation, the respondent No.1 herein, shall examine the matter in respect of the sanctioned revised plan dated 14.3.1997 and shall inquire in respect of the conduct of the officers of the Corporation and rectify the error, if any, in respect of sanctioning of plan, dated 14.3.1997.*
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> *He shall also inquire about the submission of material aspects by the original owner – the respondent No.2 of Special Civil Application No.5272 of 2001 and, if, as an outcome of the said inquiry, it is found by the Commissioner that the officers of the Corporation have shown callous attitude in sanctioning the plan he shall take action against the concerned erring officers in accordance with law.*
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> *If, as an outcome of the inquiry, it is found by the Commissioner that the*

respondent No.2 has suppressed the material aspects while submitting the second lay out plan which is sanctioned on 14.3.1997, the Commissioner shall be at liberty to take action in accordance with law against the concerned responsible persons.

The aforesaid exercise of holding the inquiry and taking suitable action in accordance with law shall be completed as early as possible preferably within a period of four months from the date of receipt of writ of this Court.

(ii) Until the inquiry is completed, as indicated hereinabove, the status quo as existing on today qua the property which is under construction as per second sanctioned lay out plan dated 14.3.1997 shall continue to remain in operation

It is clarified that the aforesaid directions shall not operate as bar to the holder of the property to submit the revised development plan for construction by complying the requirement of open space/margin land which is shown as part of COP in second plan sanctioned on 14.3.1997.

If in the revised development plan the

land of the petitioner of Special Civil Application No.5272 of 2001 is excluded from the COP, then in that case, it would be open to the petitioner to apply to the Corporation for construction, if otherwise permissible in accordance with law."

6. It has been stated that the inquiry is undertaken and officers of the Corporation are not found guilty. However, so far as the consideration of the matter for exclusion of the part of the plot in possession of the petitioner of SCA No.5272 of 2001 is concerned, it appears that the Corporation considered the matter and found that the owner had sold a portion of the land to Smt. Sadhnaben Shekhar vide registered sale deed dated 6.3.1995 and the said portion was not disclosed and, therefore, the Corporation is misguided and as misrepresentation was made and the plans were sanctioned, the Corporation has taken decision of cancelling the revised construction permission granted on 14.3.1997. As the revised construction permission dated 14.3.1997 related to various other portions of the land of the

same final plot, which are in occupation of other persons, who were not parties to the earlier proceedings, the Corporation has also intimated to all the occupants and under the circumstances, the present petitions.

7. One of the grievances as sought to be canvassed on behalf of the petitioners is that no opportunity of hearing was given to the occupants, who are in occupation of the other constructions over other portions of the land of same final plot, whereas the stand of the Corporation is that some of the persons were intimated, but no representation was made.

8. The important aspect, which is not in dispute is that the revised construction permission which was sanctioned on 14.3.1997 related to various constructed portion. Not only that but prior that to vide order dated 21.10.1993, the construction permission was granted by the Corporation. Thereafter, revised development plans were submitted and the same also came to be sanctioned on 14.3.1997. It is not the case of the respondent Corporation that the constructions are not made in accordance with the sanctioned plans and, therefore, the

permission is cancelled, however, the contention on the part of the respondent Corporation is that crucial fact for transfer of the part of the land admeasuring 222.94 sq. mtrs., was suppressed and, therefore, the revised construction permission is cancelled.

9. In normal circumstances, if the holder of the property, who has submitted construction plans has suppressed the material aspect, the Corporation would be justified in cancelling the construction permission. However, in a case where after the construction plans are sanctioned, the construction is completed and thereafter if the matter is to be considered for cancellation of the construction permission, though same principles may apply, but cannot be viewed on the same basis as if no construction is made whatsoever. If it is a matter for cancellation of construction permission prior to the commencement of the construction or transfer of constructed portion by the holder of the property to third party, it may stand on a different footing. But in a matter where the construction is completed to the major extent and if the nature of construction permission is

such that each constructed complex can be independently considered and if the transfer has also taken place of the constructed poritions to third party/ies, then under those circumstances, in my view, it would also be required for the Corporation to examine as to whether the construction permission granted and the construction lawfully made deserves to be disturbed or not and whether the construction permission deserves to be cancelled even qua the construction lawfully made or not. If the construction permission is not separable but the constructed portions are separable, then to the extent to the construction is lawfully made , matters deserve to be considered separately if the fact which was suppressed has no relevance. Such portion of the construction lawfully made under the aforesaid circumstances deserves to be excluded while considering the matter for cancellation of the construction permission. To say in other words, if a construction permission is granted for a colony comprising of 100 blocks and if the permission is implemented and the construction is completed and thereafter it comes to the knowledge of the Corporation that

in respect of certain blocks there was suppression of material fact and before the Corporation is to consider the matter, prior that to, the transfer is also effected, it would be required for the Corporation to consider the matter to the extent of the block to which the suppression of material fact has any relevance. If say for the land concerning to 5 blocks there are suppression of material facts, it would be unreasonable to read the power for cancellation of the permission to all 100 blocks. Such power, if read, may result into arbitrariness and consequently may also result into causing injustice to the innocent persons or to the persons, who are not at all concerned with the suppression of material facts, neither they are beneficiary, nor can they be said to have derived any additional rights on account of the so-called suppression of material facts. Even otherwise also the cancellation of a construction permission, may be on the ground of suppression of material facts, is a penal action. Therefore, when the matter is to be considered after a long time, at the stage when the construction is completed and the ownership

of a distinct and separable constructed portion is already transferred to a third party, it would be required for the Corporation to consider and to exercise the power for cancellation of permission to the extent, keeping in view the relevancy of the suppression of material facts and also to that extent.

10. In the present case, if the matter is examined, even Mr. Desai, learned counsel appearing for the Corporation, during the course of hearing, declared before the Court that as such, as per the Construction Permission dated 14.03.1997, there is no dispute for appropriate margin and for area of common plot and he submitted that as per the information of the Corporation, the ground level construction is completely in accordance with the Construction Permission. However, he submitted that as per the Corporation, some of the persons at the first floor have made certain additional/alteration of constructions, for which the permission is not granted. He was candid in admitting that the permission dated 14.03.1997 is not cancelled on that ground and he further submitted that for such aspects of additional/alteration of

construction in contravention to the permission or otherwise, the Corporation shall take appropriate action as may be permissible in law against the persons concerned.

11. Under these circumstances, if the construction is made at the ground level on the portion over which the construction was permitted and if appropriate margin and common plot is maintained as required under the bylaws of the Corporation and the only aspect which was required to be considered by the Corporation was the question of suppression for the area of 222.94 sq. mtrs, which is sold to Sadhnaben Shekhar Rai vide Registered Sale Deed dated 06.03.1995, the Corporation could not have cancelled the permission of all constructed portions.

12. Neither before the Corporation nor before this Court, the original owner Shri Modi has appeared nor has he submitted the explanation in response to the alleged ground of suppression of the aforesaid aspects. It is also not in dispute that the area of 222.94 sq. mtrs., which has been purchased by Sadhanaben Shekhar Rai is pertaining to a portion, which was formerly a part of margin land vide Construction Permission

dated 21.10.1993 and subsequently, a part of Common Plot vide Construction Permission dated 14.03.1997. Therefore, the dispute or the so-called suppression relate to the area of common plot and the permit for construction over the area of common plot. As per the order passed by this Court in the Judgment dated 07.04.2005 at para 8, it was observed inter alia that :

> *"Even if it is not disclosed and the lapse is considered on the side of vendor as well as purchaser, then also the purchaser of the property cannot have better right than the vendor. If the respondent No.2 could not make any construction over the portion of the land which is purchased by the petitioner of Special Civil Application No. 5272/01, then the petitioner in any case cannot assert the right to make the construction over the land which is a portion of COP."*

13. However, as it was further submitted by the petitioner of Special Civil Application No. 5272 of 2001 that here construction plan was not sanctioned, the Court further observed that the position of the petitioners of Special Civil

Application No.5272 of 2001 for the said area, which is part of COP for making construction would remain the same since no construction is otherwise permissible on the area of COP. But, as the aforesaid aspect was no disclosed by the owner of the property when the second revised plan was submitted and was sanctioned on 14.03.1997, this Court directed for consideration of the matter by the Corporation.

14. Mr. Motiramani, learned counsel appearing for respondent No.4 submitted that once the Judgment dated 07.04.2005 passed by this Court in Special Civil Application No. 5272 of 2001 is made final and is acted upon, this Court may not take any contrary view than what was ordered by this Court in the earlier Judgment.

15. In my view, whether the construction permission can be cancelled on the ground of suppression of material fact or suppression of the relevant fact, was the aspect, which came to be considered by the Court in its earlier judgement. However, on the questions of quantum of penal action, the matter neither arouse for consideration, nor this Court had an occasion to consider the same. Further, the direction was

given to the Corporation to consider the matter in accordance with law. Therefore, if the Corporation was to exercise the power in accordance with law, as observed earlier, the Corporation was also required to consider the aspects on the quantum of penal action, even on the ground of suppression of the fact regarding transfer of portion of the land admeasuring 222.94 sq. mtr. in favour of Smt. Sadhnaben Shekhar Rai. If the original owner of the land by suppressing the fact regarding sale of the portion of the land has submitted the revised layout plan, then at the most, the purchaser of the land would be entitled for consideration of the matter as it existed on the date when the transfer was effected. It is not in dispute that the transfer was effected on 06.03.1995 and at the relevant point of time, the Construction Permission dated 21.10.1993 was in operation and accordingly, as per the said Construction Permission dated 21.10.1993, the area which his purchased by respondent No.4 was a part of the margin land. Even otherwise also, no construction over the margin land can be permitted, save and except, the special type of

construction, as per the bylaws or GDCR. After the purchase of the land on 06.03.1995, the portion is shown as under COP. There would be little difference in the status on the date when the property was purchased and in the revised layout plan of 14.03.1997, inasmuch as, even in the COP, certain type of construction may be permissible. However, it will be for the respondent No.4 to resort to appropriate proceedings against original owner as may be permissible in law, but on account of the portion of the land admeasuring 222.94 sq. mtr., which was formerly portion of margin land and now a portion of COP as per the revised construction plan, the other occupant of the constructed portions, which is already completed and for which, there is no dispute for the title of the construction at least at the level of the ground floor, it would not be proper on the part of the Corporation to cancel the whole revised permission. The Corporation could not have cancelled the permission which related to other separable constructed portions.

16. In the present case, as the Corporation has exercised the power for cancellation of the

revised Construction Permission dated 14.03.1997 in toto, instead of considering the matter which only relates to area of 222.94 sq. mtrs., shown in COP, the decision of the Corporation for cancellation of the revised Construction Permission in toto cannot be maintained in the eye of law. It was required for the Corporation to consider the matter of the area of COP, which relates to 222.94 sq. mtrs. purchased by Smt. Sadhnaben Shekhat Rai, as it was a matter pertaining to the preservation of COP.

17. It has not come on record as to whether the respondent No.4 purchased the property with full knowledge or whether the original owner disclosed the said aspects to the respondent No.4 at the time when the transfer was effected, I find that it is not possible for this Court to make observation on the aspects of any misrepresentation or otherwise by the owner leading to the purchase of the land by respondent No.4 or otherwise. Therefore, under these circumstances, it would be for respondent No.4 to resort to appropriate proceedings as may be permissible in law against the owner of the land, in case if respondent No.4 is aggrieved by

any suppression of material fact by the vendor of the land.

18. In view of the above and considering the peculiar circumstances, I find that on factual aspects, there is no dispute that other constructed portion, i.e. other than the portion of COP, is not related to the alleged suppression of transfer of 222.94 sq. mtrs. of the land in favour of respondents No.4, no useful purpose would be served in directing the Corporation to reconsider the matter once again by observing the principles of natural justice than to decide the matter as per the observations made hereinabove. Therefore, in view of the peculiar facts and circumstances as narrated hereinabove, I find that the Corporation was not justified in cancelling the revised permission qua the constructed portion other than the area of COP. Therefore, the order of the Corporation deserves to be quashed to that extent.

19. In view of the aforesaid discussions and observations, the order of the Corporation dated 19.05.2006 for cancellation of the revised permission dated 14.03.1997, is quashed and set

aside, so far as it relates to permitting construction for the land other than reserved for COP. However, it is observed that if as per the GDCR or the bylaws of the Corporation, any alteration /relaxation in COP is permissible for enabling the respondent No.4 to make construction over any part of the area purchased by the respondent No.4, the same may be considered by the Corporation in the event such an application is submitted by respondent No.4. It is clarified that it would be open to Respondent No.4 to take appropriate proceedings as may be permissible in law against the respondent No.3 in case, as per respondent No.4, any right of respondent No.4 is adversely affected or put in jeopardy by respondent No. 3. If such an action is taken, all rights and contentions of respondent Nos. 3&4 shall remain open.

20. Petitions are partly allowed to the aforesaid extent. Considering the facts and circumstances, there shall be no order as to costs.

26.9.2006 **(Jayant Patel, J.)**

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